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TS CHONG & CO

v.

MOUNT AUSTIN PROPERTIES SDN BHD & ORS

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HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: (MT1) 24-88-2006]
27 JUNE 2008

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CIVIL PROCEDURE: *Interpleader summons - Stakeholder's interpleader - Solicitors acting as stakeholders for retention sums under sale & purchase agreements - Whether liquidator appointed for developer company entitled to demand for release of retentions sums from stakeholder - Ownership of retention sums - Whether stakeholder's claim for set-off valid*

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CIVIL PROCEDURE: *Housing developers - Sale & purchase Agreement - Stakeholding of retention sums under sale & purchase agreements - Ownership of retention sums - Liquidator appointed for developer company - Whether liquidator entitled to demand for release of retentions sums from stakeholder - Section 7A(6) of the Housing Developers (Control and Licensing) Act 1966*

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CIVIL PROCEDURE: *Res judicata - Different cause of action and issues - Plaintiff in present action not a party to previous action - Subject matter of present action and previous action different - Whether doctrine of res judicata applied*

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CIVIL PROCEDURE: *Set-off - Principles - Pre-condition for set-off to take effect - Party intending to exercise right to set-off must assert that right by taking legal proceedings - Party claiming set-off had fully settled debt owing to party against whom set-off is claimed - No valid set-off arising*

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The 1st defendant company developed a housing project and the 2nd defendants entered into sale and purchase agreements ('SPA') with the 1st defendant for the purchase of housing units. Pursuant to the said agreements the 2nd defendants paid to the plaintiff, a firm of solicitors appointed by the 1st defendant as stakeholder, the 5% retention sum being the final payment of the purchase price. The 2nd defendants' solicitors later informed the plaintiff of their intention to claim for agreed liquidated damages from the 1st defendant for late delivery of their housing units and therefore put the plaintiff on notice against the release of the

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Stakeholder Sum to the 1st defendant. The special administrators of the 1st defendant (then in provisional liquidation) however demanded the release of Stakeholder Sum. In the face of the competing claims the plaintiff applied to the court under O. 17 r. 1 of the Rules of the High Court 1980 for the court to grant relief by way of interpleader proceedings. It was argued for the 1st defendant, *inter alia*, that (i) the Stakeholder Sum was part of the assets of the 1st defendant company which the liquidator was under a statutory duty to preserve, collect and distribute for the benefit of the creditors of the 1st defendant company; (ii) the stakeholder had no legitimate claim whatsoever in the Stakeholder Sum and cannot resist the liquidator's claim; and (iii) the matter was *res judicata* by reason of a court order dated 14 September 2006 ordering the plaintiff to release the Stakeholder Sum to the liquidator. Against this, it was argued that each of the 2nd defendants may set-off the 5% retention sums paid to the plaintiff qua stakeholder against their respective claims for damages for late delivery.

Held (Ordering the plaintiff to pay the Stakeholder Sum to the liquidator of the 1st defendant company within one month of the date of the order):

- (1) Pursuant to s. 7A(6) of the Housing Developers (Control and Licensing) Act 1966, since the 1st defendant company had already been wound-up, the Stakeholder Sum held by the plaintiff qua stakeholder did not form part of the property of the 1st defendant company. Upon the 1st defendant company being wound-up subsection (6) stipulates that the Stakeholder Sum shall (i) vest in the liquidator of the 1st defendant company and (ii) be held by the liquidator to be applied in accordance with the law relating to the winding-up of a company. (para 30)
- (2) The 1st defendant's submission on *res judicata* was flawed since the plaintiff herein was not a party in the winding-up proceedings under which the said order was obtained. The subject matter of the said proceedings were also different. (para 19)
- (3) In order for a set-off to take effect, it is incumbent upon the party intending to exercise the right to set-off to assert that right by taking legal proceedings. There was no affidavit evidence to show that (i) the 2nd defendants had previously

- A received any payments from the 1st defendant; or (ii) the 2nd defendants had instituted any legal proceedings against the 1st defendant or had obtained any judgment against the 1st defendant in respect of their claims. There was thus nothing for the 2nd defendants to set-off against. As at the date of
- B the hearing of the OS, nothing was due to the 1st defendant by the 2nd defendants as they had already paid the full purchase price under the sale and purchase agreements. The 1st defendant was not making any claims against the 2nd defendants for any sums under the sale and purchase
- C agreements. (para 34)

Case(s) referred to:

- Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* [2001] 4 CLJ 572 HC (**refd**)
- GT Rajan v. Lee Yoke Lay & Anor* [1994] 2 CLJ 767 HC (**refd**)
- D *Hampden v. Walsh* [1876] 1 QBD 189 (**refd**)
- Kredin Sdn Bhd v. Development & Commercial Bank Berhad* [1995] 4 CLJ 18 CA (**refd**)
- Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73 HC (**refd**)
- E *Samat Din & Partners v. Bank Pembangunan (Malaysia) Bhd & Anor* [1997] 4 CLJ 153 CA (**refd**)
- SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 FC (**refd**)
- Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557 FC (**refd**)
- F *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC (**refd**)

Legislation referred to:

- Bankruptcy Act 1967, ss. 41, 53(1)
- G Companies Act 1965, ss. 219(2), 223, 224, 233, 291, 293
- Housing Development (Control and Licensing) Act 1966, s. 7A(5), (6)
- Rules of the High Court 1980, O. 17 r. 1
- For the plaintiff - PK Nathan (En Faisal with him); M/s Hazelin & Assoc*
- For the 1st defendant - PC Lee; M/s PC Lee & Assoc*
- H *For the 2nd defendant - En Parthiban; M/s L Parthiban, Zulkiflee & Assoc*
- Reported by Amutha Suppayah*

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JUDGMENT**A****Vernon Ong Lam Kiat JC:**

[1] The plaintiff's originating summons (encl. 2) (the 'OS') is made under O. 17 r. 1 of the Rules of the High Court 1980 which confers power on the court to grant relief by way of interpleader proceedings. Order 17 r. 1 RHC reads as follows:

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(1) Where:

(a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto, or

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(b) claim is made to any money, goods or chattels taken or intended to be taken by a sheriff in execution under any process, or to the proceeds or value of any such goods or chattels, by a person other than the person against whom the process is issued,

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the person under liability as mentioned in sub-paragraph (a), or (subject to rule 2) the sheriff, may apply to the Court for relief by way of interpleader.

E**Background Facts**

[2] Sometime in 1996 and 1997 the 1st defendant company was involved in the development of a housing project known as Taman Mount Austin. The 2nd defendants comprising of 27 individuals respectively entered into sale and purchase agreements ('SPA') with the 1st defendant for the purchase of housing units. Pursuant to the said agreements the 2nd defendants paid to the plaintiff, a firm of solicitors the 5% retention sum being the final payment of the purchase price. According to cl. 4 of the SPA dealing with the payment of the purchase price:

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4(1) The purchase price shall be paid by the Purchaser to the Vendor by instalments and at the time and in the manner as prescribed in the Third Schedule.

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[3] According to the Third Schedule in the SPA the final balance 5% of the purchase price shall be paid upon "handing over of vacant possession as in item (3) and to be held by the vendor's solicitors as stakeholder for payment to the vendor as follows:

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- A (a) 2.5 per centum (2.5%) at the expiry of the 6 months after handing over of vacant possession
- (b) 2.5 per centum (2.5%) at the expiry of 18 months after handing over of vacant possession.
- B [4] By a letter dated 16 October 2000 the 1st defendant appointed the plaintiff as its solicitors to hold the said 5% retention sum as stakeholders. Pursuant thereto the plaintiff received the sum of RM414,546.58 ('the Stakeholder Sum') being the aggregate of the 5% retention sum payments made by the 2nd
- C defendants.
- D [5] By letters dated 2 April 2001, 16 April 2001, 28 September 2001, 16 April 2002, 14 April 2002 and 19 October 2004 solicitors acting for the 2nd defendants, *inter alia* informed the plaintiff of their intention to claim for agreed liquidated damages from the 1st defendant for late delivery of their housing units. The 2nd defendant's solicitors also put the plaintiff on notice against the release of the Stakeholder Sum to the 1st defendant.
- E [6] By letters dated 23 October 2001, 24 February 2003, 28 March 2003 and 1 April 2003 the special administrators of the 1st defendant, *inter alia* demanded the release of Stakeholder Sum. Later by a letter dated 16 August 2004 solicitors for the 1st defendant company (then in provisional liquidation) demanded
- F payment of the Stakeholder Sum. The plaintiff received another demand letter dated 15 December 2005. An exchange of correspondence followed between the solicitors for the 1st defendant, the 2nd defendants and the plaintiff ensued. Suffice it to say that in the face of the competing claims the plaintiff applied
- G to the court for relief by way of the present interpleader proceedings.

Cause Papers

- H [7] The following affidavits were filed by the parties in connection with the hearing of the OS:
- I Plaintiff's affidavit affirmed on 13 January 2006 (encl. 3);
- 1st defendant's affidavit in reply affirmed on 17 March 2006 (encl. 4);
- Plaintiff's affidavit in reply affirmed on 14 April 2006 (encl. 5);

Plaintiff's further affidavit in reply affirmed on 5 October 2006 (encl. 6); A

1st defendant's affidavit in reply affirmed on 16 November 2006 (encl. 15); and

2nd defendants' affidavit in reply affirmed on 31 January 2007 (encl. 9). B

The Law On Stakeholder

[8] The plaintiff was appointed as the stakeholder of the Stakeholder Sum pursuant to the 1st defendant's letter to the plaintiff dated 16 October 2000. The plaintiff's appointment as stakeholder is consistent with the provisions of cl. 4(1) and the Third Schedule in the SPA. It is therefore clear that the plaintiff received the retention 5% payment sums from the 2nd defendants as stakeholder. Accordingly, at all material times the plaintiff was acting as stakeholder of the Stakeholder Sum. C D

[9] The plaintiff's dilemma stems from the conflicting claims of the 1st defendant and the 2nd defendants. It is important to note that interpleader proceedings are not, in the strictest sense, proceedings against anyone, but are proceedings, the object of which is to extricate the applicant from the embarrassment of being sued, or likely to be sued, by more than one party in respect of the same subject matter; and also to put the claimants in a position in which, if they are going to insist upon their claims, they should do so when the application was made. E F

[10] The word 'stake' is commonly used to apply to any money to be disposed of in accordance with what may happen in future; and whoever is in possession of the money is often described as a stakeholder. How the money is to be disposed of depends on the terms on which it is held. (see *Halsbury's Laws of Malaysia* at para. 420.020) A stakeholder is defined as a person who receives money and holds it *in medio* pending the outcome of a future event. (see *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73) Generally the duty of a stakeholder is to hold the money as trustee for both parties to await that event and until that event is known, it is his duty to keep it in his own hands. (see *Hampden v. Walsh* [1876] 1 QBD 189) G H

[11] As to what is in essence stakeholding in the particular circumstances of this case, it is instructive to reflect on what the Supreme Court said in *Toh Theam Hock v. Kemajuan Perwira* I

- A *Management Corp Sdn. Bhd.* [1987] 2 CLJ 26; ([1987] CLJ (Rep) 400). In that case the appellant is an advocate and solicitor and the respondent a housing developer. The appellant was appointed as solicitor for the respondent housing developer. Five percent of the purchase price was retained by the appellant to be paid to
- B the respondent as soon as the certificate of fitness was issued. The certificates of fitness were in fact issued and the total amount of the deposit paid to the respondent. However, the appellant refused to pay over the interest earned on the deposit. The High Court held that the advocate and solicitor had acted as an agent
- C for the housing developer. That as an agent he was liable to account for whatever money he received for the housing developer including interest. At the Supreme Court, however, the appellant's appeal was allowed. The Supreme Court held that the respondent agreed to abide by the terms of the sale and purchase agreement
- D with regard to the 5% of the purchase price to be paid to their solicitors as stakeholders which was to be paid only on the production of the certificates of fitness for occupation of the premises. The respondent was not entitled to the deposit until the certificate of fitness was issued. In the premises the appellant
- E cannot be held accountable to the respondent in respect of the interest on the deposits in each case up to the date of the issue of the certificate of fitness. At p. 28 (p. 402) Hashim Yeop A. Sani SCJ said:
- F What is in essence stakeholding? The word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future; and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is disposed of depends on the terms on which it is held.
- G In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell v. Finch* [1977] AC 728 who repeated what was said in *Maloney v. Hardy* [1970] 216 EG 1582:
- H The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other
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In any particular case of sale and purchase, whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned judge concluded that in this case the appellant received the deposit as agent for the respondents in a fiduciary capacity and therefore on general principles he would be accountable.

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In *Burt v. Claude Cousins & Co. Ltd.* [1971] 2 QB 426 Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell v. Finch* (*supra*). He said:

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If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder," he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of Property of Reed* ([1967] 2 All ER 1286 at 1289), per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harrington v. Hogart* ([1830] 1 B & Ad. 577). If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v. Kingsman* ([1818] 1 B & Ad. 683) and *Hampden v. Walsh* ([1876] 1 QBD 189). He cannot sue the vendor, because the vendor has never received it, or becomes entitled to receive it.

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Pennycuick V.C. in *Potters v. Loppert* [1973] 1 All ER 658 at page 661 considered the law in relation to contract deposits. Where money is placed *in medio* in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

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A Competing Claims

[12] This court is called upon to adjudicate upon the competing claims of the 1st defendant and the 2nd defendants. Briefly, the claims of the said defendants are predicated upon the following grounds.

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[13] 1st Defendant's Claim

- C** (1) The Stakeholder Sum is part of the assets of the 1st defendant company which the liquidator is under a statutory duty to preserve, collect and distribute for the benefit of the creditors of the 1st defendant company.
- (2) The stakeholder has no legitimate claim whatsoever in the Stakeholder Sum and cannot resist the liquidator's claim.
- D** (3) The matter is *res judicata* by reason of a court order dated 14 September 2006 ordering the plaintiff to release the Stakeholder Sum to the liquidator.

2nd Defendant's Claim

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[14] The submission by learned counsel for the plaintiff supported the 2nd defendants' claim for the Stakeholder Sum. Learned counsel for the 2nd defendants adopted the plaintiff's submission. The 2nd defendants' claim is grounded principally on only one issue, namely:

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- (1) The 2nd defendants have the right to set-off the Stakeholder Sum against their claim for damages for late delivery.

1st Defendant's Submission

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[15] Learned counsel for the 1st defendant submitted that subject to two conditions under the terms of the SPAs the entire Stakeholder Sum shall be released to the 1st defendant. The two conditions, namely: (i) expiry of 18 months after delivery of vacant possession of the housing units, and (ii) rectification of defects by the 1st defendant have already been satisfied. The 1st defendant is also claiming the interest accrued on the Stakeholder Sum on the basis that it is part of the assets of the 1st defendant company. In support thereof learned counsel referred to s. 7A of the Housing Development (Control and Licensing) Act 1966 ('the HD Act'). The pertinent subsections in s. 7A are as follows:

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Subsection (5)

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Subject to paragraph 6(b), all monies in the Housing Development Account and **all monies held by the stakeholder shall, notwithstanding any other law to the contrary, be deemed not to form part of the property of the housing developer in the event:**

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- (a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or
- (b) **the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.**

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Subsection (6)

Upon the happening of any of the event referred to in subsection (5):

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- (a) the monies in the Housing Development Account and **moneys held by the stakeholder shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be,** to be applied for all or any purposes for which monies in the Housing Development Account and moneys held by the stakeholder are authorised by regulations made under this Act to be withdrawn; and
- (b) any money remaining in the Housing Development Account and **moneys held by the stakeholder,** after all payments have been pursuant to paragraph (a) and all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, **shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be,** as money belonging to the licensed housing developer **to be applied in accordance with the law relating to the bankruptcy of or the winding-up of a company.** (emphasis added)

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[16] It is plain that according to sub-s. (6) of s. 7A of the HD Act the Stakeholder Sum shall vest in the liquidator of the 1st defendant company. This provision is also consistent with s. 233 of the Companies Act 1965 which provides that where a winding-up order has been made the liquidator 'shall take into his custody or under his control all property and things in action to which the company is or appears to be entitled.' In this case the Stakeholder Sum was deposited with the plaintiff for a specific purpose and that is: to be released to the 1st defendant upon the fulfilment of

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A the two aforesaid conditions. The two conditions having been fulfilled under the Stakeholder Sum shall be vested in the liquidator in accordance with the aforesaid subsections.

B [17] Secondly, learned counsel for the 1st defendant submitted that the plaintiff *qua* stakeholder has no legitimate claim whatsoever in the Stakeholder Sum. In support of the proposition learned counsel cited the Court of Appeal case of *Samat Din & Partners v. Bank Pembangunan (Malaysia) Bhd & Anor* [1997] 4 CLJ 153 where Gopal Sri Ram JCA said at p. 157:

C The sole question for determination at this stage is whether the appellant as solicitor may successfully resist the first respondent's claim for custody of the issue document of title. That question, I think, must be answered in the negative and against the appellant. It is axiomatic and no citation of authorities is required for the proposition that a solicitor acting as a stakeholder has no claim whatsoever to the subject matter of this stakeholding. If numerous claims are made of him in respect of the subject matter of the stakeholding, it is plain where his duty lies. It is for him to apply to the court by way of interpleader proceedings to seek its directions as to what he should do.

E The aforesaid submission is relevant only insofar as it relates to the plaintiff's claim for interest accrued on the Stakeholder Sum. On this issue the authorities are quite clear. In *GT Rajan v. Lee Yoke Lay & Anor* [1994] 2 CLJ 767 the appellant solicitor acted in a sale and purchase transaction in which the respondents sold a piece of land to two purchasers. Pursuant to the sale and purchase agreement the appellant was to hold the balance purchase price of RM750,000 until the memorandum of transfer was registered in favour of the purchasers. The appellant solicitor only forwarded the memorandum of transfer for adjudication and stamping after the balance purchase price was paid, causing a delay of four months before the respondent received the money. When the balance purchase price was paid by the purchaser to the appellant solicitor the respondents requested that the amount be deposited into a fixed deposit interest bearing account. The appellant solicitor, however, took the view that he was a stakeholder of the money and need not accede to the respondents' request. The balance purchase price was eventually released to the respondents without any interest. The respondents complained to the State Bar committee about the appellant solicitor's conduct. The issues before the disciplinary committee were, *inter alia*: (i) whether the appellant solicitor was a solicitor

for the respondents or a stakeholder; and (ii) whether the appellant solicitor was late in sending the memorandum of transfer for adjudication and stamping. The disciplinary committee answered both questions in the affirmative and found the appellant solicitor guilty of conduct unbefitting an advocate and solicitor. The appellant solicitor appealed against the decision. Allowing the appeal the High Court held that the appellant solicitor first acted as a solicitor for the respondents. However, when the agreement was executed, the appellant solicitor's role as an agent was transformed. In respect of the balance purchase price the appellant solicitor was placed in a position of a trustee when he was accountable to both the purchasers and the respondents and in order to protect both their interests, the appellant solicitor was clearly a stakeholder. From decided authorities, it is clear that if a person is a stakeholder then he is not accountable to any party for any interest gained while holding the money on trust.

[18] Subsequently in *Toh Theam Hock (supra)* the Supreme Court held that the appellant was held not accountable to the respondents in respect of the interest on the deposits. Applying the principles enunciated above it is this court's finding that the plaintiff *qua* stakeholder is not accountable to the 1st defendant for the interest accrued on the Stakeholder Sum.

[19] Thirdly, learned counsel for the 1st defendant submitted that the matter is *res judicata* by reason of a court order dated 14 September 2006 (exh. S6 in encl. 15) under Companies Winding-Up No. MT2-28-102-2004 ordering the plaintiff to release the Stakeholder Sum to the liquidator. This contention is flawed for the following reason. For reasons not disclosed to this court, the plaintiff herein is not a party in the winding-up proceedings under which the said order was obtained. It is for this reason that the 1st defendant has not enforced the said order against the plaintiff. To this day the said order remains unenforced *vis a vis* the plaintiff. It is also pertinent to note that the subject matter of the said proceedings were different.

2nd Defendant's Submission

[20] The 2nd defendants' claim is grounded on one principal issue, namely that the 2nd defendants have the right to set off the Stakeholder Sum against their claim for damages for late delivery. This point was argued vigorously by learned counsel for the plaintiff. To appreciate learned counsel's submission it is important

- A to bear the following facts in mind: On 28 April 2004 the petition for the winding-up of the 1st defendant company was presented. The provisional liquidator was appointed on 31 May 2004. On 26 April 2005 an order for the winding-up of the 1st defendant company was made and the provisional liquidator appointed the liquidator for the 1st defendant company.
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- [21] According to learned counsel for the plaintiff, there are two pertinent periods to bear in mind. Firstly, there is the so-called 'interim period' which runs from the date of the presentation of the petition for the winding-up to the date of the winding-up order. In this case the 'interim period' would run from 28 May 2004 to 26 April 2005. Secondly, there is what is commonly known as the 'twilight period' which is the period of six months prior to the date of the presentation of the winding-up petition. In this case the twilight period will run from 29 November 2003 to 28 May 2004.
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- [22] In support of the above propositions learned counsel relied on the decision of the Court of Appeal in *Kredin Sdn Bhd v. Development & Commercial Bank Berhad* [1995] 4 CLJ 18. In that case a petition for the winding-up of the appellant company ('Kredin') was presented on 14 August 1987. On 23 January 1988 the respondent bank ('D&C') sued Kredin on a loan agreement and judgment was entered against it. In order to execute the judgment D&C registered a prohibitory order on a few parcels of land belonging to Kredin on 31 March 1992. Following the execution proceedings, Kredin made applications, *inter alia*, to set aside the prohibitory order on the ground that it was void under s. 224 of the Companies Act 1965 as it was filed after the commencement of the winding-up under s. 219(2) of the said Act. The application was, however, dismissed on the ground that the prohibitory order could only be rendered void after a winding-up order had been made under s. 224 and since a winding-up order may ultimately not be made, the execution was not void. Kredin appealed to the Court of Appeal. The issue before the Court of Appeal concerned the interpretation to be given to s. 219(2) of the said Act and its practical effect when read together with s. 224. The Court of Appeal held, *inter alia*, that: (1) s. 224 of the said Act provides that any attachment, sequestration, distress or execution put in force against the estate or effects of a company after the commencement of the winding-up by the court shall be void. Pursuant to s. 219(2), a compulsory winding-up is
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deemed to commence at the time when the winding-up petition is presented; and (2) the intention of Parliament in enacting ss. 219(2) and 224 of the said Act is to ensure that no creditors, particularly the unsecured creditors, who execute their claims against the company would be enriched at the expense of other secured creditors, between the date when the winding-up petition is presented and the date when the winding-up order is made by the court ('the interim period').

[23] In regard to the 'twilight period', learned counsel cited *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* [2001] 4 CLJ 572. In that case after the respondent ('OAB') went into liquidation, the liquidator took control and discovered that certain dispositions by OAB to the creditor bank might be void during the relevant periods under s. 293 of the Companies Act 1965 read together with s. 53(1) of the Bankruptcy Act 1967 and s. 223 of the Companies Act 1965. The liquidator applied for declarations that certain fixed deposits and debit advices paid to the bank during the applicable periods constitute undue preference. James Foong J (as he then was) taking note of two important periods said at p. 579:

By the nature of the laws to be applied there are two important periods to bear in mind:

1. Between 5 August 1998 (a day after the filing of the winding-up petition) and 6 December 1998 (the date of the winding-up). For this period the provision in s. 223 of the Companies Act shall apply. For ease of reference, I shall refer to this period as **"the period under s. 223"**.
2. Between 4 February 1998 (six months from the date of presentation of winding-up petition) and 4 August 1998 (the date of the filing of the winding-up petition). For this period the law as laid down in s. 293 of the Companies Act read with s. 53(1) of the Bankruptcy Act shall apply. This stretch of time is commonly known as the **'twilight period'** for the simple reason that one is uncertain whether the company will be wound up or continued to function. Again for ease of reference, I shall use this term to refer to this time frame. (emphasis added)

[24] It is the 2nd defendants' contention that their claim for agreed liquidated damages for late delivery of their housing units were made long before the twilight period, ie, before 29 November 2003. The 2nd defendants' right to set off occurred long before

- A the twilight period. Therefore, it is contended that the liquidator has no right whatsoever in law to lay his hands on the Stakeholder Sum as it is outside the ambit of the twilight period.

2nd Defendants' Right Of Set-Off

- B [25] Learned counsel for the plaintiff argued strenuously that each of the 2nd defendants may set-off the 5% retention sums paid to the plaintiff *qua* stakeholder against their respective claims for damages for late delivery. It was also argued that the aforesaid rights of the 2nd defendants were enshrined by the statutory provisions of the Housing Development (Control and Licensing) Act 1966 and the rules made thereunder. The rules also prescribes a sale and purchase agreement whereby the purchaser is entitled to claim damages for late delivery at 10% per annum based on the purchase price. Accordingly, it was submitted that the legal right to set-off was already in existence and also provided at the time of entering into the sale and purchase agreements.
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In support thereof learned counsel for the plaintiff referred to the Federal Court decision in *S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305. In that case the purchaser withheld payment of the amount demanded by the housing developer by way of set off against the balance of the purchase price the late delivery damages due to the purchaser. One of the issues which arose for consideration was whether the purchaser in withholding payment of the last instalment due commit breach of the agreement. The Federal Court held that the purchaser did not breach the agreement when she withheld payment of the amount demanded by the housing developer. The purchaser's cross-claim and the housing developer's claim was so closely connected that it would be manifestly unjust to allow the housing developer to enforce payment without taking into account the purchaser's cross-claim.

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- H [26] Learned counsel also referred to *Guide to Company Law in Malaysia and Singapore (CCH Asia Ltd)* where at para. 14-472 dealing with set-off reads as follows:

- I In the winding-up of an insolvent company, that section of the bankruptcy legislation applies which allows a set-off where there have been mutual credits, mutual debts or other mutual dealing between the parties. For example, if at the commencement of a winding-up a person has a money claim against the company for \$10,000 and the company has a money claim against that person

for \$7,500, the second claim may be set-off against the first leaving an amount due by the company of \$2,500 for which the creditor may prove. (*Sovereign Life Assurance Co. v. Dodd*). Where mutual debts and credits exist, an account is made out and the balance proved (*Mersey Steel & Iron Co. v. Naylor Benzon & Co.*; *Hiley v. The Peoples Prudential Assurance Co. Ltd*).

The main points to note in a set-off are:

- The mutuality must be between the parties in the same capacities; for example, the liquidator cannot set-off a sum due from a firm in which a contributory is a partner against a debt due by the contributory alone (*Re Pennington & Owen Ltd*);
- Although a debt itself is not in existence at the commencement of the winding up, the rights and liabilities must be in existence at that time (*Re Collinson; Smith v. Sinnathamby*). In allowing a set-off at the date of the liquidation of the company, it is sufficient that the liability of one of the parties is merely contingent and only at some time later becomes a fixed liability (*Re a Debtor*). It is in this context that the bankruptcy rule of relation back has been applied. This rule was invoked to deprive the assignee of a debt from a set-off in the liquidation in circumstances where the assignment had occurred after the assignee and assignor (its parent company) had first received notice that the company was unable to pay its debts (*Re Eros Films Ltd*);
- The cross-claims are commensurable that is they must be capable of being brought together in a money account (*Eberle's Hotels and Restaurant Co. v. Jonas*; *Re Auriferous Properties Ltd*; *Re Leeds and Hanley Theatres of Varieties Ltd*).

[27] In further support of the 2nd defendants' contention, learned counsel for the plaintiff cited *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557. In that case by an equipment lease agreement the lessor leased to the lessee a plastic injection moulding machine. Pursuant to the said lease agreement the lessee deposited with the lessor a prepaid rent of RM3,958 and RM64,500 as security for the due performance of the agreement. Upon a winding-up petition being presented against the lessee, the lessor terminated the said lease agreement and demanded payment of the outstanding amount after setting-off the said deposit payments. The lessee was subsequently wound-up and a liquidator appointed. The liquidator demanded from the lessor the return of the said deposits but the

A lessor refused to comply. The two key issues before the Federal Court in the appeal were: (i) whether the set-off was a voidable preference under ss. 223 and 293 of the Companies Act, read together with s. 53(1) of the Bankruptcy Act?; and (ii) if 'no', then whether, the set-off pursuant to the said lease agreement was authorised by s. 41 of the Bankruptcy Act, which is made applicable to insolvent companies by s. 291 of the Companies Act? In allowing the appeal the Federal Court held that:

(1) In considering the question whether there has been a disposition within the terms of s. 223 of the Companies Act, the relevant date is not the date of the set-off but the date of the transaction. In this case, the transaction had been concluded long before the onset of the twilight period – statutorily defined as six months prior to the commencement of the winding-up. Accordingly, the court is not empowered to make an order setting aside the payment of the deposits.

(2) The lessor was entitled to the statutory set-off provided for by s. 41 of the Bankruptcy Act, in respect of the deposits, regard being had to the fact that there had been 'mutual dealings' within the meaning of the section, between it and the lessee and the operation of the statutory set-off was reinforced by the said lease agreement which authorised the lessor to set-off the deposits against the amounts owing thereunder upon termination of the lease on winding-up.

[28] Finally learned counsel argued that the 2nd defendants' right to set-off the Stakeholder Sum against their claim for damages for late delivery is allowed by s. 41 of the Bankruptcy Act 1967 which is as follows:

41. Mutual Credit and set-off

(1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

(2) A person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him.

A

[29] Learned counsel for the plaintiff also submitted that at the time the 2nd defendants entered into the SPAs with the 1st defendant up until the time when vacant possession of the housing units were handed over, the 1st defendant was solvent. There was also no evidence to show that the 1st defendant was insolvent until the presentation of the winding-up petition on 28 May 2004. In the premises it was submitted that the 2nd defendants are entitled to set-off the Stakeholder Sum against their claim for the late delivery damages.

B

C

Finding Of Court

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[30] In the present case since the 1st defendant company has already been wound-up, the Stakeholder Sum held by the plaintiff *qua* stakeholder does not form part of the property of the 1st defendant company. (see sub-s. (5) of s. 7A of the Housing Development (Control and Licensing) Act 1966) Upon the 1st defendant company being wound-up sub-s. (6) further stipulates that the Stakeholder Sum shall (i) vest in the liquidator of the 1st defendant company and (ii) be held by the liquidator to be applied in accordance with the law relating to the winding-up of a company.

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F

[31] In view of the court's finding aforesaid, are the 2nd defendants entitled in law to set-off the Stakeholder Sum against their claim for late delivery damages. In this context, it is pertinent to look at the definition of a set-off. A set-off is defined by *Stroud's Judicial Dictionary Of Words And Phrases* (6th edn) as follows:

G

A legal set-off is: "where there are mutual debts between the plaintiff and defendant, or if either party sued or be sued as executor or administrator (where there are mutual debts between the testator or intestate and either party), one debt may be set against the other

H

[32] According to *Odgers on Pleading and Practice* (12th edn) a set-off may be described as a shield which operates only as a defence to the plaintiff's action, and a counterclaim, on the other hand, operates as a sword with which the plaintiff may be attacked. A set-off is a defence to the whole or to a portion of

I

A the plaintiff's claim. The power of the court to allow a defence of set-off is contained in the schedule to the Courts of Judicature Act 1964.

B There is nothing in the affidavit evidence indicating that the 2nd defendants exercised their right to set-off against the payment of the final 5% retention sum being the final payment of the purchase price their claim for late delivery damages. The 2nd defendants paid the said sum when it became due. After making the said payments the 2nd defendants were no longer indebted to the 1st defendant. There was thus nothing for the 2nd defendants to set-off against. The 2nd defendants' contention that the set-off against the Stakeholder Sum took effect before the onset of the twilight period and as such the set-off was valid and effective is also without merit. In order for a set-off to take effect, it is incumbent upon the party intending to exercise the right to set-off to assert that right by taking legal proceedings. That did not happen. According to the affidavit evidence the 2nd defendants' solicitors only notified the plaintiff *qua* stakeholder of their intention to claim for late delivery damages *vide* a series of letters running from 2001 to 2004. No legal proceedings were instituted by the 2nd defendants against the 1st defendant for the late delivery damages. Merely notifying the plaintiff of their claim was in the circumstances insufficient. If prior to the twilight period the 2nd defendants had proceeded to sue and obtained judgment against the 1st defendant, then the Stakeholder Sum could have been garnished by the 2nd defendants to satisfy the judgment. Unfortunately this the 2nd defendants did not do. In the circumstances of this case the 2nd defendants' notification of their right to set-off is merely a bare assertion and of no avail. Accordingly, the 2nd defendants' purported set-off could not latch on to the Stakeholder Sum as by that date the Stakeholder Sum had already been vested in the liquidator by virtue of sub-ss. (5) and (6) of s. 7A of the HDA.

H [33] In *S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo (supra)* the purchaser withheld payment of the amount (the balance of the purchase price) demanded by the housing developer and claimed that she was entitled to set-off against the amount demanded the late delivery damages due to her. The amount set-off by the purchaser in that case was held back by the purchaser against the housing developer's claim against her. The issue before the Federal Court was whether the purchaser breached the agreement in

withholding the payment. It was held that the purchaser did not breach the agreement. The facts of that case and the issue before the Federal Court are therefore entirely distinguishable altogether. *Lee Poh Choo (supra)* is accordingly of no aid to the 2nd defendant's contention.

[34] In *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd (In liquidation) (supra)* upon a winding-up petition being presented against the lessee, the lessor terminated the said lease agreement and demanded payment of the outstanding amount after setting off the said deposit payments paid to the lessor previously. The lessor was exercising its right of set-off the deposits which were already paid to it by the lessee. The facts in that case are also distinguishable from the facts of this case. In the present case the 2nd defendants are attempting to set-off the Stakeholder Sum against their claim for late delivery damages. There is no affidavit evidence to show that (i) the 2nd defendants have previously received any payments from the 1st defendant; or (ii) the 2nd defendants have instituted any legal proceedings against the 1st defendant or have obtained any judgment against the 1st defendant in respect of their claims (as in *Sime Diamond Leasing (supra)*). There is thus nothing for the 2nd defendants to set-off against. In this respect, s. 41 of the Bankruptcy Act is also of no aid to the 2nd defendants as there is nothing for the 2nd defendants to "set-off against any sum due from the other party ...". The 2nd defendants' right of set-off, if any, goes in reduction of any sums due to the 1st defendant. As at the date of the hearing of the OS, nothing is due to the 1st defendant by the 2nd defendants as they have already paid the full purchase price under the sale and purchase agreements. The 1st defendant is not making any claims against the 2nd defendants for any sums under the sale and purchase agreements.

[35] For the foregoing reasons it is ordered that the plaintiff pay the Stakeholder Sum of RM414,546.58 to the liquidator of the 1st defendant company within one month of the date of the order. The plaintiff is not accountable to the 1st defendant for the interest accrued on the Stakeholder Sum. The parties to the proceedings shall bear their own costs.